NO 080367

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON

DYLAN TURNER, RHIANNON TURNER, RONAN TURNER, by their next friend and parent, DIANE TURNER, individually and on her own behalf,

Plaintiffs Below/Appellants

vs:

Case No. 080367
(Berkeley Co.06C-717)

CHARLES TURNER, JR., CHARLES TURNER, SR., and LAURIE TURNER,

Defendants Below

and

CITY HOSPITAL INC.,

Intervenor Below/Appellee

APPELLANT'S BRIEF

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TO THE HONORABLE JUSTICE OF THE
SUPREME COURT OF WEST VIRGINIA:

Come now the Appellants, DYLAN TURNER, RHIANNON TURNER, RONAN TURNER, by their next friend and parent, DIANE TURNER, individually and on her own behalf, by counsel Brenda Waugh, and request that this Court reverse the decision of the circuit court holding that it lacks jurisdiction to effectuate an infant settlement in this matter in accordance with the agreement reached by the Appellants and the Appellees, Charles Turner, Charles Turner, Jr. and Laurie Turner over the objection of the Appellee, City Hospital, Inc.

The Appellants, Ronan, Rhiannon, and Dylan Turner are three young innocent children. They have suffered immensely by the horrific acts of their father which caused Ronan, at the age of two, to suffer serious physical injuries. All of the children have suffered physical and emotional injuries in the automobile accident caused by their father. Along with their mother, they have been involved in five separate court proceedings resulting from their father's callous acts. In an effort to protect these children, maintain stable family relationships, and provide for their future education and medical needs, their mother negotiated a settlement with their paternal grandfather's insurance company.

An unrelated third party, her employer, the Appellee, City Hospital, Inc., now seeks to force her into litigation against her family members. Her employer seeks to have this court interpret a law which was enacted to protect her employment benefits from being mishandled, to cause her to enter into yet another series of hearings and further litigation by insisting, without participating in mediation or otherwise negotiating any compromise, that they are entitled to a 100% recovery for every dime paid under her health insurance policy.

Fortunately, the laws of the State of West Virginia were designed to protect children such as Ronan, Rhiannon and Dylan from the type of action that Appellant, City Hospital, Inc. is seeking this court to sanction. Such action is not authorized by state nor federal law.

The lower court refused to accept jurisdiction and issue an order in accord with the Plaintiffs' and Defendants' agreement which dismissed the civil action provided for an infant settlement, contingent upon an equitable reduction of liens. The lower court erred in ruling that it had no jurisdiction over adjudication of the infant settlements beyond merely approving or disapproving the settlement. The lower court erred when it found that the State laws of West Virginia are preempted by the ERISA and then failed reduce any subrogation lien asserted by City Hospital, Inc. in accord with established doctrines. For these reasons, the decision of the lower court should be set aside and this matter should be remanded with instructions for the lower court to hold a hearing regarding the infant settlement petition and properly exercise jurisdiction to reduce the liens in conformity with the laws of the State of West Virginia. In the alternative, this matter should be remanded for further factual development with regard to the plan adopted by City Hospital, Inc. such that the court may make findings of fact as to the applicability of the "savings" clause for a proper adjudication of the issues of preemptions under the provisions of that clause

I. THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

This matter involves the infant settlement of a civil action wherein three children were injured when their father, under the influence of drugs and/or alcohol, crashed the vehicle in

which they were passengers into a utility pole, causing one of the children to suffer serious injuries. A settlement was negotiated between the Appellants/Plaintiffs and the insurance carrier for the Defendants and presented to the Honorable. Christopher C. Wilkes, Circuit Judge. The settlement was contingent upon the reduction of a medical insurance lien asserted by City Hospital, Inc., which asserted lien consumes nearly the entire recovery of the infant child, Ronan. A petition to approve the infant settlement and address the liens was filed by the Appellants. The circuit court scheduled the infant settlement proceeding for hearing. City Hospital, Inc., intervened in the proceeding. Upon presentation of the issues the circuit court scheduled the matter for briefing on the issue of the court's jurisdiction to reduce the liens in accordance with the laws of the State of West Virginia. The court then issued a final order with respect to the infant settlement where the court recognized that the court had jurisdiction to hear the proposed infant settlement and approve or disapprove the settlement. However the court refused to exercise jurisdiction over the reduction or enforcement of any lien asserted by any party in the matter.

II. FACTS OF THE CASE

Most of the facts of this proceeding are not in dispute and are set forth in the order of the Circuit Court declining jurisdiction. On October 4, 2004, the Defendant, Charles Turner, Jr., was operating a vehicle in Berkeley County, West Virginia, with the permission of the owners, his father, Defendant Charles Turner, Sr., and step-mother, Laurie Turner. His children, Rhiannon, who was then age 7, Dylan, age 5, and Ronan age 4, were passengers in the vehicle. Charles Turner, Jr., who has since been prosecuted by the State of West Virginia with driving under the

influence and felony child neglect, wrecked the vehicle when he ran it into a utility pole. The children sustained injuries. Ronan was seriously injured with multiple injuries that required a nearly month long hospital stay and several months of rehabilitation. His injuries included a colon injury, fracture of the ileum, peritonitis, pulmonary insufficiency following trauma and surgery, gastrointestinal tract injury, small intestinal injury, tachycardia, and anemia. Rhiannon suffered multiple abrasions and soreness on her face and hip and emotional trauma. Dylan suffered from a hematoma on his left temple and eye, abdominal abrasions and swelling, digestive disorder, and emotional trauma. While both Rhiannon and Dylan have substantially recovered from their injuries, the physicians anticipate that Ronan will need future medical treatments due to the injuries to his colon.

The children incurred medical costs. Ronan's total medical bills to date total $111,088.19. Dylan's medical treatment costs total $5,473.85, and Rhiannon's $688.27. A portion of their medical bills was paid by the Westfield medical payments coverage held by Charles Turner, Sr., in an amount up to $5000.00 for each child. The bulk of the remaining balance of their medical bills was paid by the medical insurance provided by the Appellee, City Hospital, Inc. through their mother's employment. Based upon a form #5500 filed with the IRS, City Hospital, Inc., has made arrangements for "Informed Insurance Servics (*sic*) to perform as a third party administrator for their health insurance plan." [Exhibit #1 to Plaintiff's Brief, filed July 16, 2007] No evidence was offered nor was discovery permitted as to the nature of the program or as to the arrangement that City Hospital, Inc., has made with any regulated insurer as a "reinsurer,""excess insurer", "a stop gap insurer", or an "umbrella insurer." The amounts paid

through InforMed are as follows: Dylan: $404.66, Rhiannon: $184.96, Ronan:$106, 697.08. [Order entered September 28, 2007; Exhibit #2 to Plaintiff's Brief, July 16, 2007]

The Appellant, Ms. Tuner, has expended a great deal of time and effort in the litigation that resulted from her former spouse's recklessness.[1] In the civil action currently before the court, Ms. Turner actively pursued pre-suit mediation with Westfield and reached a resolution as set forth in her PETITION. Both the Appellee, City Hospital, Inc. and Infor-Med were formally requested to participate in the mediation but refused. [Exhibit #3 to Plaintiff's Brief, July 16, 2007] Ms. Turner reached a tentative settlement with Westfield on behalf of the children wherein she agreed to waive her personal interest in the settlements to allow settlement of the children's cases within the policy limits so long as City Hospital, Inc., would be precluded by the circuit court from asserting a lien inconsistent with the laws of the State of West Virginia. Since that time, the Appellant, Ms. Turner, has attempted to negotiate a mutually acceptable reduction of their asserted lien but the Appellee, City Hospital, Inc., has persisted in asserting a lien for the entire amount of payments rendered without any reduction for attorney fees, attorney costs, or in conformity with the "make-whole" or other equitable doctrines.[2]

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[1]This litigation includes a criminal action, State of West Virginia v. Turner, Berkeley County Magistrate Court Case Numbers: 04F-1523-04F-1525; Berkeley County Circuit Court Case Number: 05F-376; a divorce and child custody action Turner v. Turner, Family Court of Jefferson County Case Number: 05D-106; an abuse and neglect case against Charles Turner, Jr.: In re Rhiannon, Dylan and Ronan Turner, Berkeley County Circuit Court Numbers: 06 JA 157, 06 JA 158, 06 JA 159; and the application for benefits for the children from the West Virginia Crime Victim's Fund, Application of Diane Turner, West Virginia Court of Claims Number:CV 105-102a-c.

[2]Policy limits on the Westfield policy held by the children's grandfather are $100,000.00 and $300,000.00. Policy limits on the Appellant's (Ms. Turner), underinsured policy held by

A complaint was filed in this civil case and served, but the Plaintiffs/Appellants and Defendants agreed to stay proceedings in order to present the infant settlement for review by the circuit court. The infant children, joined by the Guardian Ad Litem, requested that the lower court approve the infant settlement and reduce the children's liability for the liens in accordance with the laws of the State of West Virginia. City Hospital, Inc., moved to intervene in the infant settlement proceeding and the circuit court granted their motion. A hearing was held on June 22, 2007, wherein the court established a briefing schedule regarding the issues presented solely in the infant settlement proceeding. The court did not take any evidence at the hearing and accepted the proffer of counsel as to the amounts that the Appellee, City Hospital, Inc., asserts in their lien. [Order entered September 28, 2007] Counsel for the Appellants accepted the proffer by counsel at the initial hearing that the administrator for the plan at City Hospital, Inc., is unwilling to accept any amount less than the full amount that they assert in the lien. [Tr. June 22, 2007]

The circuit court made findings of facts based upon the proffers of counsel, without permitting discovery on the nature of the Plan. While recognizing that the circuit court has the jurisdiction to approve the minor settlement as set forth in the PETITION, the circuit court refused to exercise jurisdiction as to the distribution of the proceeds of that settlement. The circuit court refused to order the disbursement of the proceeds of the infant settlement in accord with established state law which requires the reduction of the lien asserted by the Appellee. The

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Nationwide is $15,000.00 [Order entered September 28, 2007, Exhibit #5 to Plaintiff's Brief filed July 16, 2007]

infant children, by their next friend and by their Guardian Ad Litem, appeal this ruling and respectfully request that this Court reverse the circuit court and hold that the circuit court has jurisdiction to approve the settlement reached by the Appellants and Defendants, Charles Turner, Sr., Charles Turner, Jr. and Laurie Turner, in the underlying action, and thereby reduce the lien asserted by the Appellee, City Hospital, Inc., in accord with state laws.

III. ASSIGNMENTS OF ERROR

1. The circuit court erred in refusing to exercise jurisdiction over an infant settlement proceeding consistent with W.Va. §44-10-14, when it further ruled that West Virginia laws pertaining to the reduction of medical liens asserted by certain health insurance plans are preempted by the ERISA preemption clause, 29 U.S.C. §1144(a) (1982).

2. The circuit court erred in refusing to exercise jurisdiction over an infant settlement proceeding consistent with W.Va. §44-10-14, when it further ruled that West Virginia laws pertaining to the reduction of medical liens asserted by certain health insurance plans are preempted by the ERISA preemption clause, 29 U.S.C. §1144(a) (1982) without taking evidence or making findings of fact as to whether or not the plan involves a regulated insurer under ERISA's "savings clause" 29 U.S.C. §1144(b) (1982) such as a "reinsurer", an "excess insurer" or a "stop gap insurer" and is therefore exempt from application of the preemption clause.

IV. TABLE OF AUTHORITIES RELIED UPON BY Appellants

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V. ARGUMENT

A. This Court should review the decision of the circuit court to decline subject matter jurisdiction by a de novo standard of review.

In Orlofske v. The City of Wheeling,212 W.Va. 538, 575 S.E.2d 148 (2002) this Court reviewed a case involving whether or not the Circuit Court had properly exercised jurisdiction over benefits provided by ERISA. In that action, involving a writ of mandamus, this Court held that "Where the issue on an appeal from the circuit court is clearly a question of law ... we apply a de novo standard of review." *Syl. Pt.* 1, *Id.*, See also Inasmuch as the sole issue presented in this appeal involves a question of law, the standard governing review is therefore a de novo standard. See also Snider v. Snider, 209 W.Va. 771, 777, 551 S.E.2d 693, 699 (2001), Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995)

B. West Virginia Circuit Courts have jurisdiction to reduce a lien in the context of an infant settlement petition filed in Circuit Court in accord with all applicable West Virginia laws pertaining to infants, the made whole rule, contracts, valid subrogation clauses and unjust enrichment. Well established state laws are not preempted Employment Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1001 *et seq.*.

W.Va. Code §44-10-14[2002] places broad authority over infant settlement proceedings in the circuit courts of the state. The statute requires that the court must not only approve or deny

the settlement, but also direct payment, reading in significant part:

> **W.Va. Code** §44-10-14(g) Order approving or rejecting settlement. -- The court shall enter an order with findings of fact and granting or rejecting the proposed settlement, release and distribution of settlement proceeds. If the requested relief is granted, the court shall provide by order that an attorney appearing in the proceeding or other responsible person shall negotiate, satisfy and pay initial expense payments from settlement proceeds, the costs and fees incurred for the settlement and any bond required therefor, ***expenses for treatment of the minor related to the injury at issue, payments to satisfy any liens on settlement proceeds, if any, and such other directives as the court finds appropriate to complete the settlement and secure the proceeds for the minor.*** (*Emphasis added*)

W.Va. Code §44-10-14(g).

In this matter, the circuit court has recognized its authority to approve or reject the settlement, and agreed that it had jurisdiction to make the determination as to whether or not various state laws are preempted by ERISA. Orlofske v. Wheeling, *supra*, 212 W.Va. 538. However, the circuit court's analysis failed when the court declined jurisdiction to direct payment of liens and secure the proceeds for the minor. In reaching this conclusion, the circuit court did not provide a detailed analysis, but broadly held that all applicable state laws are preempted by ERISA. This overly broad reading of the pre-emption clause as applied to ERISA is not supported by the prior holdings of this Court or the United States Supreme Court.

In Martin Oil v. Philadelphia Life Insurance Company, 203 W.Va. 266, 507 S.E.2d 367 (1997), this Court addressed the "preemption clause," Section 514 of ERISA, 29 U.S.C. §1144(a), in accord with the analysis adopted by the United States Supreme Court. In addressing a dispute between companies involving pension termination, the court held that ERISA did not pre empt state law. This Court's only syllabus point in this case reads:

> A party seeking preemption under the jurisdictional provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (1994), must first overcome the starting presumption that Congress does not intend to supplant state law. State law actions that are clearly subject to preemption include those where West Virginia law attempts to affect the manner in which pension benefits are calculated under federal law, where the pension plan's existence is a critical element of the state law cause of action, or one in which the West Virginia statute expressly refers to ERISA or ERISA plans. Those state law actions that incidentally involve or refer to ERISA plans, but do not present the risk of conflicting or inconsistent state law concerning pension plan regulation are not preempted under federal law.

Martin Oil, *supra.*

This Court rejected the argument that "...(T)he mere reference to the Martin Oil pension plan in the instant case requires preemption." This Court cited Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146-47 (2nd Cir.), *cert. denied*, 493 U.S. 811, 110 S.Ct. 57 (1989), and several lower court opinions, in support of its holding that mere incidental reference or effect of state laws on an ERISA plan does not provide the requisite basis for preemption. *Id.*

In Martin Oil, this Court adopted the restrictive reading of the "related to" provision of the ERISA preemption clause articulated by the United States Supreme Court in the post-1995 line of decisions, including De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 117 S.Ct. 1747 (1997), and New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 115 S.Ct. 1671 (1995). This Court noted "...(T)he Supreme Court referenced its "unequivocal conclu[sion]" in Travelers that "ERISA's 'relates to' language was [not] intended to modify 'the starting presumption that Congress does not intend to supplant state law.'"De Buono, 520 U.S. at 813, 117 S.Ct. at 1751." Martin Oil, *supra,* 203 W.Va. 266, at 272.

In determining whether or not the presumption against preemption is overcome in the case sub judice, the circuit court should have gone beyond the text of ERISA and, "...look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* (Quoting De Buono,520 U.S. at 813, 117 S.Ct. at 1751.) Such examination properly places the "considerable burden" upon the Respondent/Intervenors to overcome the presumption that Congress did not intend to supplant state law. *Id.* This Court continued in Martin Oil, observing that "...(s)tate laws of general applicability, ***such as tort or contract***, as well as those actions that involve "garden variety" commercial disputes are frequently determined to be beyond the reach of the preemption clause." Martin Oil, *id.*, 203 W.Va. 266, at 272 (*emphasis added*).

Martin Oil, in concluding that the circuit court properly determined that this action was not subject to preemption, this Court held:

> ...(N)either does the mere inclusion of reference to an ERISA plan within a civil action constitute sufficient basis for preemption. Following the United States Supreme Court's recent pronouncements in this area, we hold that a party seeking preemption under the jurisdictional provision of ERISA, 29 U.S.C. § 1144(a), must first overcome "'the starting presumption that Congress does not intend to supplant state law.'" De Buono, 520 U.S. at 813, 117 S.Ct. at 1751 (quoting Travelers, 514 U.S. at 654, 115 S.Ct. 1671)."

Martin Oil, *id.*, 203 W.Va. 266, at 274.

This Court again held that ERISA did not preempt state law in Donaldson Mine Company v. Human Rights Commission, 187 W.Va. 631, 420 S.E.2d 902 (1992). In holding that the West Virginia Human Rights Act was not preempted by ERISA, even though the statute had an effect on the pension plan, the court noted:

> In a number of cases involving preemption under ERISA, federal district courts have recognized that where retirement benefits are peripheral to an employee's claim of age discrimination, even though the denial of retirement benefits was in issue in the case, the claim should be held to be an age discrimination claim and not an ERISA claim. See Yageman v. Vista Maria, Sisters of the Good Shepherd, 767 F.Supp. 144 (E.D.Mich.1991); Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir.1989). The courts have further recognized that the mere fact that the relief which is to be afforded to an employee or former employee under state law may involve an employee benefit plan does not mean that the case is subject to ERISA preemption. Martori Brothers Distributors, Inc. v. James-Mas-sengale, 781 F.2d 1349 (9th Cir.1986), cert. denied 479 U.S. 1018, 107 S.Ct. 670, 93 L.Ed.2d 722 (1986); Schultz v. National Coalition of Hispanic Mental Health Organizations, 678 F.Supp. 936 (D.D.C.1988).

Id., at 631.

The cases cited by this court in Martin Oil provide clear guidelines and factors which the Circuit Court did not apply in the case sub judice in determining whether or not the Appellee overcame the presumption that West Virginia state laws of general application were not preempted by ERISA. Factors similar to those set forth in Martin Oil have been articulated by both this Court and Unites States Supreme Court. These considerations include:

(1) "...A ***presumption*** that Congress ***does not*** intend to supplant state law." New York Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co, *supra*, 514 U.S. 645, at 654. *(Emphasis added.)*

(2) The party asserting preemption must convince the court that the statute sought to be preempted is the type of law that Congress specifically intended ERISA to preempt. De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, *supra*, 520 U.S. 806, at 814.

(3) The anti-preemption presumption can be overcome if the state law in question "acts ***immediately and exclusively*** upon ERISA plans" or if "the existence of ERISA plans is ***essential***

to the laws operation" then the law "refers to" an ERISA plan and is preempted. In Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., 519 U.S. 316, 325, 136 L.Ed. 791, 800 (1997). (*Emphasis added.*)

(4) The anti-preemption presumption may also be overcome when the state law has a clear "connection with" a plan that the law "mandated employee benefit structures or their administration" or "provides alternative enforcement mechanisms."' Travelers, *supra*, 514 U.S. 645, at 658.

(5) When a state law of general application simply imposes some burdens on ERISA plans it should not be preempted. De Buono, *supra*, 520 U.S.806.

State laws pertaining to the made-whole doctrine, contracts by infants, the common funds doctrine, and the laws restricting the validity of certain subrogation clauses are precisely the laws that the circuit court failed to substantively address when it held that all such laws are preempted by ERISA. Rather than engage in the detailed analysis demanded by this court in Martin Oil and the United States Supreme Court, the court relied on a summary analysis pre-dating these decisions involving a state law which directly impacted the administration an ERISA benefit plan. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) The laws at issue in this matter are all laws of general applicability which do not act immediately and exclusively upon ERISA plan. These important laws have no connection with the administration or enforcement of the ERISA plans. Without any significant relationship, the circuit court should not have found that the Appellee City Hospital, Inc. had overcome the presumption that Congress did not intend to preempt laws adopted by West Virginia to protect our state's injured children.

The specific laws of general applicability designed to protect the injured children of the State of West Virginia include the made whole doctrine, laws pertaining to the enforcement of contracts involving children's estates, the common funds doctrine and laws limiting the enforcement of subrogation clauses.

The "made whole doctrine" has recently been described by this Court in a case involving an ERISA plan.[3] *Syl. Pt. 3,* Providen Life and Accident Ins. Co. v. Bennett, 199 W.Va. 236, 483 S.E.2d 819 (1997).

> When applying the made whole doctrine it is incumbent on the circuit court to consider: 1) the ability of parties to prove liability; 2) the comparative fault of all parties involved in the accident; 3) the complexity of the legal and medical issues; 4) future medical expenses; 5) nature of injuries; and 6) the assets or lack of assets available above and beyond the insurance policy.

Providen, *Id.*

In another case involving an injured child, the Fourth Circuit found that the West Virginia "made whole doctrine" is not preempted by ERISA. While this opinion is an unpublished per curium opinion, it provides the appropriate analysis for the case at bar. Martine v. The Hertz Corporation and U.S. Benefit and Risk Management Incorporated, 95-2648, (1995). (*Attached to Plaintiff's brief filed July 16, 2007*) After learning of an infant settlement which included medical costs paid by an ERISA plan, U.S. Benefit and Risk Managing, Incorporated intervened and asserted a subrogation in claim in excess of $124,000.00. The district court observed that the

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[3]See Footnote 3 of the Providen opinion, where it appears that this case involved an ERISA plan, "3. Subrogation and indemnity clauses existed in the employee benefits plan defendant had through his employer."

only asset available to satisfy the judgement was a $100,000.00 insurance policy and that the jury had returned a verdict which only awarded $36,800 for past medical expenses of the $650,000.00 verdict. ***The district court dismissed entirely USB's subrogation claim and the Fourth Circuit upheld that dismissal.*** In its opinion, the Fourth Circuit provides the proper analysis in addressing whether or not the state law set forth in Kittle v. Icard, 185 W.Va. 126, 405 S.E.2d 456 (1991), is preempted. The Fourth Circuit cited Kittle with approval:

> After canvassing the decisions in a number of other states that held that a legislature's use of the term "subrogation" demonstrated an intent to import the equitable consequences of that remedy, the West Virginia court stated that "`the right of subrogation depends upon the facts and circumstances of each particular case.'" Id. at 463 (quoting Huggins v. Fitzpatrick, 135 S.E. 19, 20 (W. Va. 1926)). Continuing, the court held that "`[s]ubrogation, being a creature of equity, will not be allowed except where the subrogee has a clear case of right and no injustice will be done to another.'" Id. (quoting Buskirk v. State-Planters' Bank Trust Co., 169 S.E. 738, 738 (W. Va. 1933)). Because the legislature did not alter the usual and ordinary meaning of the concept of subrogation in the applicable statute, the Court held that equity should be considered. And, on that basis, the Court then held that the trial court properly had considered the equities in deciding not to permit subrogation when the child had been unable to collect the full value of the claim. "[We conclude that the lower court did not err when it ruled that the DHS was not entitled to be subrogated to [the child's] settlement proceeds because the settlement had not made him `whole.'" Id. at 464.

Martine p. 8-9.

In Martine, the parents' health insurance plan sought to distinguish Kittle from it's plan since its subrogation right derived from contract, not a statutory right as in Kittle. The Fourth Circuit rejected that argument, noting, "`Whether legal or conventional, subrogation is an equitable remedy. The remedy is for the benefit of one secondarily liable who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor.'" Kittle, 405 S.E.2d at 460 (quoting State Farm Mut. Auto Ins. Co. v.

Foundation R. Ins. Co., 431 P.2d 737, 741 (N.M. 1967)). Martine p. 9-10.

Finally, the Fourth Circuit in Martine approved the District Court's action in denying any subrogation interest whatsoever ***since the child had not been made whole.*** Martine p. 10. The Fourth Circuit, agreed that the plan would not be subrogated ***at all*** unless the child had been made whole.

At the initial hearing in the case sub judice, Appellants and the Guardian Ad Litem requested that the circuit court approve the infant settlement and reduce the asserted subrogation interest asserted by Appellee City Hospital, Inc. Appellee argued that West Virginia laws applicable to this matter, specifically the "made whole doctrine" were preempted by ERISA and distributed a copy a memorandum opinion of the District Court in Great West Life and Annuity Insurance Company v.Barnhart, 19 F. Supp. 2d 584 (1998). The Appellee's reliance on this memorandum opinion is misplaced.

The court in Barnhart doesn't even address whether or not a state law, the made-whole doctrine, is preempted, but merely rejected Mrs. Barnhart's request that the court adopt *federal* common law made-whole doctrines. The court specifically rendered its opinion on the language of the plan and indicated that it declined "...to fashion federal common law, this Court need not decide whether the make-whole doctrine should apply to self-funded ERISA plans as a matter of federal common law." Barnhart, 19 F. Supp 2d at 584. In the brief memorandum opinion, the district court never addressed the question of state law, the state law set forth in Kittle, nor the issue of preemption

The Barnhart case cited by the Appellee in their brief filed with the Circuit Court is

factually distinguishable from the case sub judice. It involved an adult who was married to an employee of Allegheny Airlines, who was the beneficiary of a plan. That case involved a involved a settlement in the amount of $25,000.00 from which the protected plan sought $5,778.53. Mrs. Barnhart was balking at repaying about 20% of her recovery to her plan. In this case, the Appellee. is seeking 93% of infant Ronan's total settlement.

In conclusion, the circuit court never found that the Appellee met their burden to overcome the strong presumption that Congress did not intend to preempt West Virginia's "made whole" doctrine. The circuit court nonetheless refused to exercise jurisdiction to reduce the lien and approve the infant settlement. The Appellee did not meet any of the conditions established by this Court or the United States Supreme Court to sustain preemption. The made whole doctrine does not act immediately and exclusively upon an ERISA plan. No ERISA plan is essential to the operation of the "made-whole" doctrine. It does not have a clear connection with the Appellee and certainly the "made whole doctrine" does not mandate any action with respect to the administration of an ERISA plan.

The Fourth Circuit's previous finding in Martine, *supra*, that "made whole doctrine" is not preempted by ERISA should have been followed by the circuit court. The failure of the Circuit Court to do so should be set aside by this court.

Similarly, the Circuit Court erred in failing to make an findings with respect to the lack of a valid contractual provision in any agreement in the case sub judice supporting the ERISA claim for subrogation. The United States Supreme Court has recently addressed the issue of subrogation in an insurance contract. In Great West v. Knudson, 534 U.S. 204, 122 S.Ct. 708

(2002), and Sereboff v. Mid Atlantic Medical Services, Inc., ___ U.S. ___, 126 S.Ct. 1869 (2006), the United States Supreme Court held that two factors must be present in an attempt by a plan to receive funds from a settlement through an assertion of a subrogation clause. 1) A plan must contain a valid subrogation clause and; 2) any recovery is limited to "equitable relief." Sereboff v. Mid Atlantic Medical Services, Inc., 126 S.Ct. 1869. In Sereboff, the Court described the nature of ERISA subrogation as an "equitable lien imposed ***by agreement.***" *Id.*,126 S.Ct. 1869 at 1876. (*Emphasis added.*) Therefore, the agreement must be a valid agreement in order to impose such lien. However, no such valid agreement is present in this case, as any agreement or contract entered into by the mother, which acts to the detriment of the infant, is void.

This Court previously summarized the law as it pertained to the ability of a parent to enter to into a contract for an infant in Statler v. Dodson; 195 W.Va. 646, 466 S.E.2d 497 (1995)

> The traditional means of protecting an infant's interest was to refuse to imply contracts involving infants except for obligations to pay for necessaries. When the contract was for necessaries, the infant's liability was found not on the actual contract but upon a contract implied by law, or a quasi contract. See Bear's Adm'x v. Bear, 131 Va. 447, 109 S.E. 313 (1921); H.R., Annotation, Liability of Infant or his Estate for Rent, 68 A.L.R. 1185 (1930). When a contract for legal services falls within the concept of "necessaries," courts have generally used a quasi contract theory to uphold such legal contracts. See B.B.B., Annotation, p.650.

Id, 195 W.Va. 646, at 650.

This Court, in the context of enforcement of an implied contract for legal expenses held that they were: "(G)uided by "the policy of the law to protect infants against their own mistakes or improvidence, and from designs of other, and to discourage adults from contracting with an

infant." 43 C.J.S. Infants § 180 (1978). " *Id.*, 195 W.Va. at 651. The court, in footnote six cited, with approval, the rule set forth in Am.Jr.2d:

> With an express contract involving an infant, generally the common law divided such agreements into three classes: absolutely void, voidable and valid. "Agreements which were deemed clearly for the advantage of the infant were valid and absolutely binding, while those injurious to the infant were void. Agreements the effect of which might be beneficial or might be injurious were held voidable at the election of the infant on arrival at maturity." 42 Am.Jr.2d Infants § 59 (1969).

Id., 195 W.Va. at 656.

The contractual laws of the State of West Virginia, which are not insurance laws, are part of body of law designed to protect children and their estates from being compromised or reduced when that compromise or reduction is injurious to children. Rules in conformity with this principle include W.Va. R. Civ. P., Rule 17 (c). Statutes in conformity include W.Va. Code §56-4-9 and W.Va. Code §44-10-1, *et seq.*

Certainly Congress did not intend to preempt this body of law when it enacted ERISA. ERISA pertains primarily to the protection of employee's pension plans. For this reason, any agreement made by Appellant Diane Turner with Appellee, City Hospital, Inc. which is injurious to her children is not valid and/or is voidable. Appellee's plan does not include a valid agreement for repayment. The children should be permitted to receive and retain their settlement. The circuit court erred when it held that ERISA pre-empted laws pertaining to state laws regarding contracts and refused to adopt the infant settlement and render an order consistent with the agreement of the parties.

In additional to the lack of a valid subrogation agreement due to the inability of the

Appellant, Diane Turner, to have authority to enter into a contract with the Appellee, City Hospital, Inc. to assign the children's rights, the subrogation clause cited by the Appellee, City Hospital, Inc is not a valid subrogation clause in accordance with the laws of the State of West Virginia. In West Virginia, a subrogation clause is only valid when it is (1) not found to be contrary to public policy and (2) is part of a sum of money which were paid which include hospital and medical expenses. Travelers Indemnity Co. v. Rader, 152 W.Va. 699. 166 S.E.2d 157 (1969).

In Rader this Court upheld the validity of a subrogation clause in an insurance contract in limited circumstances. A clause, as it relates to medical and hospital expenses would stand, unless it constitutes an assignment of an unassignable tort claim or is otherwise against the "public policy" of this State. *Id.* In summarizing their holding, this court stated:

> ...(W)e are of the opinion that the subrogation clause in question is valid to the extent that it subrogates to the plaintiff insurance company the right to be reimbursed by the Gravelys for the amount of money theretofore paid to them for hospital and medical expenses incurred as a result of their injuries inasmuch as the Gravelys had entered into a final agreement with another insurance company by which they were paid a sum of money which included the same hospital and medical expenses.

Id. at 705.

Clearly, the clause provided by the Appellee does not meet those requirements and the circuit court should not have denied jurisdiction to hold that the clause is invalid. In this case, the sums of money have not been paid to include hospital and medical expenses. The settlement was reached without designation of funds, but due to Ronan's young age and the likelihood of future medical treatments, the subrogation clause is not valid under the laws of the State of West

Virginia when it robs the injured party for funds for future medical care, as well as all compensation for his pain and suffering.

Additionally, enforcement of this subrogation clause violates public policy for a number of reasons. Ronan's medical condition is serious and his physicians have indicated that he will need future medical procedures during his life. Pursuant to the agreement set forth in the petition, the amounts that the insurance company has agreed to pay will be placed in a structured settlement and will not be available to him until he reaches the age of eighteen. If these funds are taken from Ronan's recovery by the Appellee, City Hospital, Inc, Ronan will have be without assets as a young adult and may be unable to obtain medical treatment without public assistance.

This subrogation clause, as applied, violates public policy by permitting an insurance company to deprive an infant, such as Ronan, of 97% of the entire proceeds of his personal injury settlement. Therefore, the subrogation clause is not a valid contractual provision and cannot be enforced consistent with the laws of the State of West Virginia.

The strong statutory presumption is that Congress did not intend to preempt West Virginia laws which were enacted to promote the public policy of this state and to minimize future risks for the state in providing medical expenses and costs. The holding by this Court strikes a balance by permitting valid subrogation clauses while precluding the enforcement of unconscionable clauses. The lower court erred when it failed to follow the law as set forth in Rader and held that the West Virginia laws pertaining to the requirements of a subrogation clause are preempted by ERISA.

Finally, the Circuit Court, by declining to exercise jurisdiction, places the Appellants in

position where they must bear all litigation costs and attorneys fees. Diane Turner is the single parent of three children, one who has suffered serious injuries. She has funded litigation in five forums. In this case, she has incurred costs, paid out of pocket co-pays, and is responsible for all attorneys fees which she has incurred in the three and a half year period since the children sustained the injuries. She has entered into a contract to be responsible for all attorney fees and costs, including the one third contingency fee incurred in her efforts to prosecute this matter for the benefit of her children. While counsel has agreed, as set forth in the petition, to reduce those fees substantially as a term of the agreement, in the event that the Appellee, City Hospital, Inc.'s plan prevails in their argument that they are entitled to every penny of the proceeds of the settlement and that they are not required to pay any of these costs she will continue to be individually liable for the fees and costs.[4] Appellee, City Hospital, Inc. will net the entire amount that they claim to have paid in Ronan's behalf, $106,697.00. For her effort, Diane Turner will pay $38,333.33 for them to do so with no benefit to her or to her son, Ronan. The circuit court's reading of the preemption clause to produce this outcome is wrong.

West Virginia law is well established that an attorney who performs work for the benefit of another, including one holding a subrogation interest, should be compensated. The Court specifically addressed this issue in Federal Kemper Insurance Company v. Arnold, 183 W.Va. 31, 393 S.E.2d 669 (1990), in the context of a subrogation interest held by an automobile

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[4]In the case at bar, counsel also applied for benefits for these children from the West Virginia Crime Victim's Fund. The costs for obtaining medical records was submitted under that claim and thus far the Fund has not sought reimbursement for that expense due to the "made whole doctrine." Thus, Ms. Turner does not owe this amount out of her pocket. The Appellee, City Hospital, Inc claims that they are not responsible for any of these costs.

insurance company for medical payments. In that case, at *syllabus point* 3, this Court held: "When an automobile insurer is reimbursed, under a subrogation clause in the insurance contract, for benefits paid to a covered person that such person has then successfully recovered from a third party, the reimbursement should be reduced by the insurer's pro rata share of the covered person of obtaining the recovery against the third party." *Id.* at 32. In reaching this decision, this Court quoted with approval the New Jersey Supreme court: "To establish an artificial rule which would provide an insurer with the right to sit back and permit its insured to proceed with an action, expecting to share in the avails of that proceeding without the burden of any of the expense, occurs to us to be anomalous." Klacik v. Kovacs, 111 N.J. Super 307, 312, 268 A.2d 305, 308 (1970). This Court further correctly observed that such rule had been recognized by federal courts in Bell v. Federal Kemper Insurance Co., 693 F. Supp. 446 (S.D.W.Va. 1988). Federal Kemper, 183 W.Va. 34. Therefore, West Virginia law requires that one third of the total amount asserted as a lien by Appellee, City Hospital, Inc. be paid for their share of attorneys fees, along with a pro rata share of the litigation costs.

This Court has also specifically approved the award of attorney fees in cases involving infants. The issue was addressed by this Court:

> Although the Code and the Rules assure the protection of an infant's interests after the institution of a legal action, unless fees for legal services on behalf of an infant are allowed, most infants would be denied access to the judicial system, except for necessaries. The key to accessing the judicial system is legal representation. If minors are not required to pay for legal representation, they will not be able to protect their various interests. However, because of the need to assure that the infant's interests are protected from the legal representation, we find that contracts for legal services between infants and their lawyers will be implied and therefore, enforceable only when: (1) the employment of a lawyer on behalf of the infant was reasonably necessary; (2) the contract was fair and reasonable at the time it

> was entered; and, (3) the contract is fair in relation to the amount of legal services needed and performed. This three-part standard requiring the determinations, first, that the legal employment was "reasonably necessary," second, that the contract was fair and reasonable at the time it was entered, and third, that the legal fees were "reasonable" in relation to the legal service needed and performed, is similar to the two-part determination for the payment of a guardian ad litem under W.Va.Code 56-4-10 (1923).

Statler, *supra*, 195.W.Va. at 652.

Under Statler, the contract entered into by Ms. Turner with her children's counsel is valid. Similar to the quantum meruit analysis employed by the court in Statler and the equitable argument in Federal Kemper, the Seventh Circuit has repeatedly addressed the issue of whether or not attorney fees should be awarded consistent with state law when a plan asserts that the preemption clause precludes such payment of attorney fees and costs. In Blackburn v. Sunstrand Corporation, 115 F.3d 492 (7th Cir. 1997), the issue arose when two adults were injured in an automobile accident and Sustrand Corporation's welfare benefit plan paid $25,831.00 towards the injured parties' medical care. The Blackburns retained an attorney on a contingency fee basis and Sunstrand Corporation refused to remit any payment of their share of attorneys fees and costs from the proceeds of the settlement. The Seventh Circuit reversed the action of the lower court and held that the matter should have been heard in state court, where the Blackburns had filed the case. The court further held that the "common fund doctrine"[5] predates ERISA and permits the

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[5] The "common funds doctrine" was explained by the Illinois Supreme Court in Scholtens v. Schneider,173 Ill.2d 375, 671 N.E.2d 657 (1996). " In general, each party to litigation in the United States bears its owns attorney fees, absent a specific fee shifting statute. Over time, courts have created several equitable exceptions to this "American Rule." One of the earliest and most prevalent, exceptions is the common fund doctrine. This doctrine has been recognized and applied in the United States Supreme Court, the lower federal courts and in the courts of virtually every state in the Union. Sprage v. Ticonic National Bank, 307 U.S. 161, 164,

reduction of attorney fees and costs from an ERISA subrogation lien since the doctrine, generally, has nothing to do with health insurance. Therefore state law permitting the reduction of a lien to account for legal costs is not preempted by ERISA. *Id.* In the issue of whether or not the common funds doctrine is sufficiently related to ERISA to require preemption, that court quoted Justice Scalia as stating "The doctrine could be thought 'related' to an 'employee benefit plan' only in the trivial sense that, 'as many a curbstone philosopher has observed, everything is related to everything else.'" (citing California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., IN.,519 U.S. 316, 117 S.Ct. 832, 843, 136 L.Ed. 2d 791 (1997)). *Id.*

The Illinois State Court engaged in a similar analysis finding that attorney fees and costs were property deducted from a lien. In holding that the common funds doctrine was not preempted by ERISA, that state court recognized that "a litigant or a lawyer who recovers a common fund for the benefit of a persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id.* The Illinois court cited early decisions by the United States Supreme Court holding that unless the costs of litigation are spread to the beneficiaries of the fund, they will be unjustly enriched by the attorney's efforts. (citing Central

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59 S.Ct. 777, 779 (1939)." West Virginia's adoption of the doctrine is set forth herein under the discussion of Federal Kemper, *supra.* The doctrine has specifically been mentioned at least once in recent court decisions by Justice Davis in her dissent in The Estate of Marjorie I. Verba by Sally Jo Nolan, Executrix v. David A. Ghaphery, M.D., 210 W.Va. 30, 32, 552 S.E. 2d 406 (2001) (dissent) at Footnote 12: "There are seven generally recognized exceptions to the American rule: (1) contracts,(2) common fund doctrine, (3) substantial benefit doctrine, (4) contempt, (5) bad faith, (6) statutes, and (7) rules of court. See generally John F. Vargo, The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice, 42 Am. U. L. Rev. 1567, 1578-1590 (1993).

RR and Banking Co. v. Pettus, 113 U.S. 116, 126-127, 5 S.Ct. 387, 392-93 (1885), Trustee v. Greenough, 105 U.S. 527, 532, 26 L.Ed. 1157, 1160 (1881)). *Id.*

The Illinois court correctly observed that "...The present suit is equivalent to an action to force an ERISA plan to pay for telephone service or rent. ERISA does not require the creation of a fully insulated legal world that renders all state law preempted whenever there is a plan in the picture." Scholtens, *supra*, 671 N.E.2d at 666. The Court concluded that the effect of the "common fund doctrine" upon employee benefit plans was too tenuous, remote or peripheral to find that the doctrine 'relates to' such plans. The court concluded, "(T)hat the doctrine is outside the scope of ERISA's preemption provision. The Trustees are obligated to pay the reasonable value of the legal services rendered in protecting their subrogation lien." *Id.*, 671 N.E.2d at 668.

Certainly, the Appellee, City Hospital, Inc. cannot claim that ERISA preempts the numerous provisions of West Virginia law which mandate that they bear a share of the expenses and costs incurred in securing the settlement in this matter. West Virginia laws which extend far beyond the context of insurance preclude the Appellee, City Hospital, Inc. from being unjustly enriched, particularly in Ronan's case where they seek the bulk of his entire settlement. This court should rule that ERISA does not preempt the ruling in Federal Kemper, *supra*, Statler, *supra*, and the other doctrines pertaining to attorney fees and costs in West Virginia including the common fund doctrine, the substantial benefit doctrine, and implied contract, and should not afford the Appellee, City Hospital, Inc. an opportunity to be unjustly enriched at the detriment of an injured child and his mother.

C. A Circuit Court cannot decline jurisdiction without taking evidence and making a

finding as to whether or not the state laws are aimed at the insurance industry and therefore not preempted due to the "savings clause" 29 U.S.C. 1144 (b) and prior to the exchange and review of discovery as to the nature of the plan adopted by City Hospital, Inc.

The preemption clause of ERISA, includes a provision, "a savings clause" which returns to the State the power to enforce state laws that regulate insurance and such clause prevents these state laws from preemption by ERISA. 29 U.S.C. §1144 (b). [6] Additionally, if certain plans fall

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[6]29 U.S.C. §1144 (b) provides, in part:

Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), ***nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.*** (*Emphasis added.*)

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies...

(6)(A) Notwithstanding any other provision of this section -

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides -

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or

under the provisions of the "deemer clause" and those plans may not be subject to a State's specific insurance laws if preempted by ERISA. However, the only plans which are included in the "deemer" clause which may then attempt to avoid a state's regulation are self-funded that do not utilize any commercial insurance in any fashion. 29 U.S.C. §1144 (b) (2). Plans that purchase insurance, so called 'insured plans' are directly affected by state laws that regulate the insurance industry. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 732, 105 S.Ct. 2385 (1985).

The effects of the "savings" and "deemer" of the ERISA preemption clause were detailed in FMC Corp. v. Holliday, 498 U.S 52, 111 S.Ct. 403 (1990). The Supreme Court held, "...(E)mployee benefit plans that are insured are subject to indirect state regulation. An insurance company that insures a plan remains an insurer for purposes of state laws, 'purporting to regulate insurance' after application of the deemer clause (of ERISA)." *Id.* at 409. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to City Hospital, Inc.'s insurer.

The involvement of a regulated insurer under the ERISA deemer clause may be identified as a "reinsurer," an "excess insurer," a "stop gap insurer," or an "umbrella insurer."

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otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

Those regulated insurers may not escape the regulation by the state's insurance laws through an assertion of preemption by ERISA. *Id.*

The circuit court erred when ruling that it did not have jurisdiction to decide to limit the subrogation rights because ERISA preempts the state law claims, since the lower court did not even address the nature of the plan and the effects of the deemer clause. The court issued the ruling prior the receipt of any discovery or introduction of evidence regarding the funding and organization of the plan. Therefore, the circuit court was without sufficient evidence to determine whether or not a regulated insurer may be responsible for some portion of the risk. .

RELIEF SOUGHT

This Court is respectfully requested to reverse the circuit court and remand this case for the entry of an order approving the settlement agreement and reducing the lien of the Appellee, City Hospital, Inc., and in the alternative, to reverse the circuit court and remand this case for discovery of issues related to the interpretation of the ERISA savings clause and rulings consistent thereto.

CONCLUSION

Ronan, Rhiannon, and Dylan Turner are three innocent children. They have suffered immensely by the horrific acts of their father which caused at least one of them to suffer serious physical injuries and all of them to suffer emotional injuries. Along with their mother, they have been involved in five separate court proceedings resulting from their father's callous acts. In an effort to protect these children, maintain stable family relationships, and provide for their future education and medical needs, their mother negotiated a settlement with their paternal grandfather's insurance company.

An unrelated third party, her employer, now seeks to force her into litigation against her family members and place her in a position where her children's only source of payment for their future medical bills will be a judgment that they would have to enforce against their grandfather. Her employer seeks to use a law which was enacted to protect her employment benefits from being mishandled, to cause her to enter into yet another series of hearings and further litigation by insisting that they are entitled to a 100% recovery for every dime paid under her health insurance policy. They are so unwilling to compromise that they have refused to participate in mediation or bear any of the litigation costs or expenses.

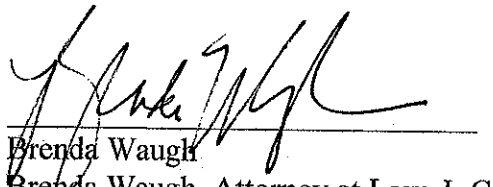
Fortunately, the laws of the State of West Virginia were designed to protect children such as Ronan, Rhiannon and Dylan from the type of action that City Hospital, Inc. is seeking this court to sanction. Such action is not authorized by state nor federal law.

The circuit court refused to accept jurisdiction which effectively dismissed the infant settlement, which was contingent upon an equitable reduction of liens. The circuit court erred in ruling that it had no jurisdiction over adjudication of the infant settlements, insofar as they address the enforcement or limits of liens or subrogation interests. The circuit court erred when it found that the State laws of West Virginia are preempted by the ERISA and then failed reduce any subrogation lien asserted by City Hospital, Inc. in accord with established doctrines. For these reasons, the decision of the circuit court should be set aside and this matter should be remanded with instructions for the circuit court to hold a hearing regarding the infant settlement petition and properly exercise jurisdiction to reduce the liens in conformity with the laws of the State of West Virginia. In the alternative, this matter should be remanded for further factual development with regard to the plan adopted by City Hospital, Inc. such that the circuit court may

make findings of fact as to the applicability of the "savings" clause for a proper adjudication of the issues of preemptions under the provisions of that clause.

RONAN TURNER, et al.,

By counsel:



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NO 080367
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS,
CHARLESTON, WEST VIRGINIA

DYLAN TURNER, RHIANNON TURNER, RONAN TURNER, by their next friend and parent, DIANE TURNER, individually and on her own behalf,
Appellant/Plaintiffs Below

vs:

Case No. _____
(Berkeley Co.06C-717)

CHARLES TURNER, JR., CHARLES TURNER, SR., and LAURIE TURNER,
Defendants Below
and

CITY HOSPITAL INC.,
Appellee/Intervenor Below

CERTIFICATE OF SERVICE

Service of the foregoing APPELLANT'S BREIF were had upon the following by placement of the same in the regular course of the U.S. Mail, with proper postaged affixed, this the 21st day of April, 2008 addressed as follows:

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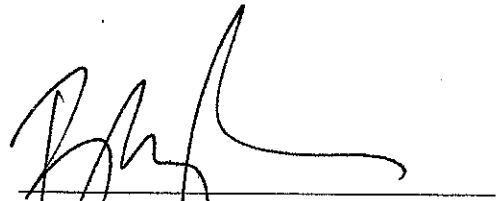

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